No. 11,692

IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

P. G. DENSON,
Appellant,

vs.

IRENE GLADYS MAPES, also known as MRS. CHARLES W. MAPES, CHARLES W. MAPES, JR., GLORIA MAPES, and CHAS. W. MAPES COMPANY (a co-partnership,
Appellees.

PETITION FOR RE-HEARING

SAMUEL PLATT
Attorney for Petitioner-Appellant.

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PETITION FOR RE-HEARING

TO THE HON. THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

NOW COMES the above named Appellant, P. G. DENSON, through his attorney, SAMUEL PLATT, and respectfully petitions the above entitled Court for a re-

hearing herein, upon the following grounds and for the following reasons:

I.

The Court did not determine, by statement or analysis, an important question involved in the appeal, that is, as to whether a party to a written contract may wilfully violate and repudiate the contract without good cause and, as in this case, deprive the other party of a remedy either at law or equity.

II.

In adopting the decision and opinion of the trial Court, this Court established as the law of this Circuit that where a person by his contract charges himself with an obligation possible to perform, he need not perform it. It is believed that this was an inadvertence. The contract obligated the Appellees to negotiate with the Appellant for the additional terms to be incorporated in the lease. They repudiated this obligation without good cause. This Court has upheld them in this wilful violation.

III.

The Court has inadvertently established as the law of this Circuit that a party to a written contract for the lease of a building under construction and not a going business, who agrees upon the material and essential provisions of the lease,

who commits herself to perform under the contract, and who accepts Ten Thousand Dollars in cash from the other party as an evidence of good faith, may deliberately repudiate the contract without good cause and deprive the other party of any remedy whatever in law or equity in any American Court.

IV.

By adopting the trial Court's opinion and conclusions, it is believed that this Court inadvertently reached the inconsistent conclusion that though the Appellees breached the contract without good cause, and by their acts waived, refused and repudiated further negotiations, yet they were entitled to recover because the contract provided for further negotiations.

V.

The Court did not consider another important point involved in this appeal, that the contract is complete and definite in itself, that it contains no condition that it shall become definite, final or absolute only upon the happening of some future contingency, and that it is a contract *in praesenti*, for which the plaintiff was obligated to deposit, and did deposit, $10,000.00 in cash as an evidence of good faith.

VI.

The Court did not pass upon or consider another important point raised on the appeal, namely, that though the contract

called for the formal and later execution of a lease, this did not negative the existence of the contract, the material and essential terms of which had been assented to and agreed upon.

VII.

The Court did not pass upon or consider another important point raised upon this appeal, namely, that the contract was definite and complete in all its material and essential terms; that it was the plain intention of the parties to be bound by these material and essential terms; that an agreement for a lease which contains the material and essential terms is enforceable in equity by specific performance; and that it was clearly the intention of the parties to embody in the lease only such subsidiary and customary provisions "to fully effectuate the intent and purposes of the parties" as definitely and completely agreed upon.

VIII.

The Court did not pass upon or consider another important point raised on this appeal, that the Appellees under the well recognized principle of equitable estoppel, were estopped from setting up their own wilful breach of the contract as a defense.

IX.

The Court did not pass upon or consider another important point raised in this appeal, namely, that the solemn promise

of the Appellees to negotiate was a condition precedent, which they may not set up as a defense in the face of their conceded wilful repudiation.

X.

The Court has in effect adopted the opinion of *Scholtz v. Northwestern, etc., Ins. Co.* (C. C. A. 8th) 100 F. 573, 574, which holds in part as follows:

> "It may be conceded that an agreement to enter into a lease will neither be enforced in equity nor at law if it appears from the face of the agreement that any of the terms of the lease, *no matter how unimportant they may seem to be*, are left open to be settled by future conferences between the lessor and lessee." (Italics supplied).

This opinion is contrary to the later conclusions in *Bondy v. Harvey* (2nd Circuit) 62 Fed. 2. 521, in which the Court found that although a lease was later contemplated by the parties "to the mutual satisfaction of the parties," the contract was enforceable by specific performance.

Also in the case of *Adamson v. Alexander Milburn Co.* 275 Fed. 148 (C. C. A. 2) the Court in principle, reached the same conclusions, namely that though the contract was subject to a later agreement between attorneys, it could be specifically enforced by specific performance.

XI.

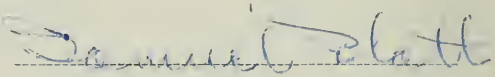
The Court did not consider or pass upon another important point raised in the appeal, namely, that the Supreme Court

of Nevada in the case of *Dondero v. Turrillas,* 59 Nev. 374, 94 P. 2nd. 276, the jurisdiction in which the contract was executed, held and established as the law of Nevada that a contract in which the parties have reached an agreement upon the essential terms may be enforced by specific performance.

XII.

The Court by analysis or opinion did not pass upon the specifications and assignments of error involved in this appeal, and particularly those specifications and assignments of error based upon the findings of fact of the trial Court.

WHEREFORE, Appellant respectfully petitions the Court for a re-hearing herein.



SAMUEL PLATT
Attorney for Petitioner-Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition, in my opinion, is well founded and entitled to the favorable consideration of the Court and that it is not interposed for delay.

Dated, Reno, Nevada, March 5th, 1948.

SAMUEL PLATT
Attorney for Appellant.